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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 94D-3

In re Application of) MM DOCKET NO. 93-298
)
DAVID LEE COMMUNICATIONS, INC.) File No. BR-890602UJ
)
For Renewal of License)
of Station WTRX(AM),)
Flint, Michigan)

Appearances

Arthur V. Belendiuk, on behalf of David Lee Communications, Inc.; and
James W. Shook, on behalf of the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE

JOSEPH CHACHKIN

Issued: March 25, 1994

Released: March 31, 1994

Preliminary Statement

1. The Hearing Designation Order (HDO) issued by the Chief, Audio Services Division, Mass Media Bureau, specified the following issues against David Lee Communications, Inc. (Lee).

- (a) To determine whether David Lee Communications, Inc. has the capability and intent to expeditiously resume broadcast operations of WTRX(AM) consistent with the Commission's Rules.
- (b) To determine whether David Lee Communications, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
- (c) To determine, in light of the evidence adduced pursuant to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

8 FCC Rcd 8412 (MMB 1993).

2. On March 1, 1994, Lee filed a motion for summary decision seeking resolution of the designated issues in favor of Lee. On March 15, 1994, the Bureau filed comments and a countermotion for summary decision. The Bureau agrees with Lee that summary decision is appropriate. It urges, however, that Lee violated Section 73.1740 of the Rules and that an appropriate sanction is grant of renewal of Lee's license for a short term to end October 1, 1995, one year before the term would ordinarily end. Lee does not oppose the request for a short term renewal.¹

Findings of Fact

3. The basic facts are not in dispute. Lee became licensee of Station WTRX(AM) on June 2, 1989, pursuant to an assignment of license (See File No. BAL-890210EB). On June 2, 1990, Lee filed its application for renewal of license. While its renewal application was pending, Lee ceased broadcast operations on Station WTRX(AM) on August 20, 1990. On September 10, 1990, Lee

¹ On March 16, 1994, Lee filed a Reply to the Bureau's Comments. Section 1.25 of the Rules does not provide for the filing of a Reply. However, Lee's pleading will be treated as a response to the Bureau's countermotion.

requested authority to suspend its operations, citing financial difficulties. Motion for Summary Decision, Exhibit 1, p. 1. By letter dated October 29, 1990, Lee was granted special temporary authority to remain silent through November 30, 1990. Thereafter, shortly before its authority to remain silent expired, Lee periodically submitted requests for continued authority to remain silent. See Attachments A through D; Motion for Summary Decision, Exhibit 1, pp. 3-4. Generally, the staff granted Lee's requests within a few weeks of their submission. See attachments E and F; Motion for Summary Decision, Exhibit 1, p. 5.

4. On December 18, 1992, Lee again requested an extension of its authority to remain silent. Lee related that it was "still in the process of working on the financial aspect of returning" its station to the air and that it was "currently negotiating with several investors ... to provide the necessary funding" Motion for Summary Decision, Exhibit 1, pp. 7-8. Lee's request was granted by letter dated January 29, 1993. Therein, Lee was advised that any further requests for authority to remain silent "must be accompanied by a detailed summary of steps taken to return the station to on-air operations." ² Motion for Summary Decision, Exhibit 1, p. 9.

5. On April 13, 1993, Lee submitted its final request for authority to remain silent. Motion for Summary Decision, Exhibit 1, pp. 10-11. Except for the date, Lee's letter was identical to its letter of December 18, 1992. By letter dated April 30, 1993, the staff found Lee's letter insufficient to warrant any further extension of its authority to remain silent, and gave Lee 30 days in which to provide a "detailed explanation of the specific steps you have taken and plan to take to return your station to the air. This may include, but is not limited to, a marketing plan, proof of listing with a broker, a list of prospective investors or buyers contacted and all other positive efforts made to sell the station." Motion for Summary Decision, Exhibit 1, pp. 12-13.

6. Lee's late filed response, dated June 3, 1993, enclosed a bank commitment letter and related that Lee was "currently in the process of negotiating a merger with a local station which we expect would ... put the station back on air in a relatively short period of time." Motion for Summary Decision, Exhibit 1, p. 14. However, the commitment letter said nothing about providing funds for resumption of broadcast operations on Station WTRX (AM) and it did not indicate how much money, if any, would be left after payment of an existing debt. Moreover, the commitment letter expressly stated that it would expire at the bank's option if, among other things, the loan was not closed on or before June 1, 1993. Attachment G. Lee's June 3, 1993, letter to the Commission neither stated that the loan had closed nor gave any hint as to when the closing would occur. The Commission heard nothing further from Lee until its late-filed notice of appearance in this proceeding.

7. On January 19, 1994, Lee and Saginaw Bay Broadcasting Corporation (SBBC), licensee of Station WMAX (AM), Bay City, Michigan, entered into a time brokerage agreement, whereby SBBC would provide programming for Station WTRX (AM). Motion for Summary Decision, Exhibit 2. On January 27, 1994, Lee filed a request for special temporary authority to resume broadcasting on Station WTRX (AM). Authority to operate was granted by letter dated January 28, 1994. Motion for Summary Decision, Exhibit 1, p. 15. Lee resumed broadcasting on Station WTRX (AM) on February 2, 1994. In the event the time brokerage agreement expires or is terminated for any reason, David Lee Scheurer, Lee's president and sole shareholder, has committed to invest personal funds to provide for the station's continued operation. Motion for Summary Decision, Exhibit 4.

² A staff letter, which granted Lee's September 15, 1992, request, was virtually identical to the staff's January 29, 1993, letter. See Motion for Summary Decision, Exhibit 1, pp. 6 and 9; and Attachment D.

CONCLUSIONS

8. Section 1.251 of the Commission's Rules provides for summary decision where there is no genuine issue of material fact for determination at hearing. New Broadcasting Corp., 44 FCC 2d 386 (1973). A request for summary decision requires a showing that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." Big Country Radio, Inc., 50 FCC 2d 967 (1975). The Presiding Judge agrees with the parties that there is no genuine dispute as to any material fact and that disposition by summary decision is appropriate.

9. Issue (a) seeks to determine whether Lee has the capacity and intent to resume broadcast operations. Since the HDO's release, WTRX(AM) has commenced regular broadcast operations. WTRX(AM) is currently operating pursuant to the terms of its Time Brokerage Agreement. The Agreement is for a term of one year with SBBC having the option to renew the Agreement for up to two additional one year terms. David Lee Schuehrer, President and sole shareholder of Lee is committed to keeping WTRX(AM) on the air. Should SBBC fail to renew the Agreement for an additional term or not perform pursuant to the terms of the existing Agreement, Schuehrer has committed to personally finance the continue operation of the station. Considering that WTRX(AM) is currently on the air and appears likely to remain so, issue (a) is resolved in Lee's favor.

10. Issue (b) calls for a determination whether Lee violated Sections 73.1740 and/or 73.1750 of the Commission's Rules. With respect to the latter Rule, Section 73.1750 requires that a licensee notify the Commission of its intent to permanently discontinue operation. The evidence makes clear that Lee never intended a permanent discontinuance of operations of WTRX(AM). Accordingly, Lee did not violate Section 73.1750.

11. Section 73.1740 of the Commission's Rules prescribes minimum operating schedules for commercial broadcast licensees. Among other things, the rule requires that, if a licensee is going to keep its station off the air for more than 30 days, it must obtain authorization from the Commission to do so. Section 73.1740(a)(4). Commission authority to operate less than the minimum required by Section 73.1740 is conferred by a grant of special temporary authority pursuant to Section 73.1635 of the Commission's Rules.

12. As noted, between August 20, 1990 and the issuance of the HDO, Station WTRX(AM) was off the air. Prior to April 29, 1993, the Commission had granted Station WTRX(AM) authority to remain silent. However, on April 30, 1993, the Commission notified Lee that its April 13, 1993, request for continued authority not to operate Station WTRX(AM) was insufficient to justify an extension of special temporary authority to remain silent. The Commission gave Lee a deadline of June 1, 1993, to submit any further request and informed Lee what such a request must include. However, Lee's June 3, 1993, letter was neither timely nor responsive. Under the circumstances, Lee had no valid reason for believing that Station WTRX(AM) had continued authority to remain silent or that its request for such authority would be granted nunc pro tunc. Hence, Lee's reliance on 5 U.S.C. Section 558(c)(2) is misplaced. In this regard, Lee did not lose its license. Rather, it simply did not receive a grant of a request for special temporary authority to remain silent. See Section 73.1635 of the Commission's Rules. By its very nature such authority is special and temporary. It does not confer upon a licensee the rights attendant to a permit or license and may be cancelled without prior notice or right to hearing. See Section 73.1635(b). In short, absent an express declaration by the Commission that Lee had continued authority not to resume broadcast operations, it had no such authority. Moreover, Lee's letters of April 13, 1993, and June 3, 1993, did not confer upon Lee authority to keep Station WTRX(AM) off the air nor did they revive any authority which had been previously granted but had since expired. Accordingly, Lee violated Section 73.1740, of the Commission's Rules.

13. In summary, issue (a) has been resolved in favor of Lee. With respect to issue (b), Lee did not violate Section 73.1750 of the Rules. As discussed, supra, Lee did violate Section 73.1740 of the Rules. While a sanction is called for, the Presiding Judge agrees with the Bureau that the imposition of a forfeiture would be counter-productive since Lee's financial condition contributed to its prolonged silence. As suggested by the Bureau, the public interest would be better served by a short term renewal of Lee's license. The Bureau's recommendation that renewal of Lee's license should be for a period ending on October 1, 1995, one year before the term would ordinarily end, is adopted.

Accordingly, IT IS ORDERED, That the Countermotion For Summary Decision filed by the Mass Media Bureau on March 15, 1994 IS GRANTED; That the Motion For Summary Decision filed March 1, 1994 by David Lee Communications, Inc. IS DISMISSED as moot; and that the application for renewal of license of David Lee Communications, Inc. IS GRANTED for a short term ending October 1, 1995.³



Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

³ In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1276(d).